IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1451 OF 2004.

Saquib Abdul Hamid Nachan,
Age 45 years, R/o: village Borivali,
Post: Padgha, Tal: Bhiwandi,
Dist: Thane. ..Appellant.

VERSUS.

1. The State of Maharashtra.

2. Mr. Ambadas Pote.

3. Mr. Suresh S. Walishetty,

4. Mr. Pradeep Sawant,

5. Dr. Satyapal Singh,

6. Mr. Kiran Thakur,

7. Ms. Rohini Salian. ..Respondents.

...

Appearance:

Ms. Rebaca Gonsalvez for the appellant.

Mr. V.A.Thorat, Advocate General with Mr.B.R.Patil and
Ms. P.H.Kantharia for the State.

CORAM: S. B. MHASE &
ANOOP V. MOHTA, JJ.

DATE : DECEMBER 21, 2004.

ORAL JUDGMENT.**(Per S.B.MHASE,J.):-**

1. This appeal is directed against the order passed by the Special Court constituted under the provisions of the Prevention of Terrorism Act, 2002 (hereinafter in short referred to as "the POTA Act"). The order under challenge

is dated 27th October 2004. It arises from Miscellaneous Application Nos. 69 of 2004, 70 of 2004 and 92 of 2004.

2. By Miscellaneous Application No. 69 of 2004 the applicant prayed to initiate criminal proceedings against the State of Maharashtra through DCB CID, Police headquarters, Crawford Market, Mumbai and police officers, Shri. Ambadas Pote, Asstt. Commissioner of Police, Shri. Suresh S. Walishetty, Asstt. Commissioner of Police, Shri. Pradeep Sawant, the then DCP, DCB CID (at present under suspension) as also against Dr.Satypal Singh, the then Jt. Commissioner of Police, DCB, CID, Mumbai. The appellant also prayed before this court to issue an order for sanctioning the prosecution of respondent accused including an order, if needed under section 197 of the Cr.P.C. and to prosecute them as accused for offence punishable under POTA 2002 and also to pass an order against respondents to pay an amount of Rs.5 lacs by each of them to the applicant - complainant in view of section 58 of the POTA 2002.

3. In Miscellaneous Application No.70 of 2002, the applicant prayed for identical reliefs against Mr. Kiran Thakur, Dy.Secretary to the Government of Maharashtra, Home Department (Special), Mantralaya, Mumbai and the State of Maharashtra with prayer to initiate criminal proceedings against the respondents for offences punishable under

section 58(2) of POTA 2002 as also for various offences punishable under the IPC with prayer for an order for issuance of sanction for prosecution of the respondent No.2 under section 58 of POTA 2002 and also if needed under section 197 of Cr.P.C. with further prayer directing the respondent Mr.Kiran Thakur to pay Rs.10 lacs as compensation to the applicant - complainant.

4. By another Miscellaneous Application No.92 of 2004 the applicant - complainant prayed for to initiate criminal proceedings against the public prosecutor for Greater Mumbai, City Sessions Court with identical relief for compensation as also to prosecute her and prayed for issuance of sanction as also to initiate proceedings for contempt of court against the Public Prosecutor - Ms. Rohini Salian.

5. All the above referred three miscellaneous applications have been preferred by the same applicant. These applications were vehemently opposed by the Government.

6. The appellant was one of the accused in POTA Case No. 1 of 2003, popularly known as the **"Ghatkopar Bomb Blast Case"** in Maharashtra. However, the present applicant was discharged by the Special Court constituted under the POTA

Act by its order dated 4th March 2004. Thereafter these above referred applications have been moved by the applicant - appellant herein with the aid of Section 58 of the POTA Act. Before we proceed to consider the appeal on merit for admission, we would like to quote section 58, which reads as under:

> **58. Punishment and compensation for malicious action:-** (1) Any police officer who exercises powers corruptly or maliciously, knowing that there are no reasonable grounds for proceeding under this Act, shall be punishable with imprisonment which may extend to two years, or with fine, or with both.
>
> (2) If the Special Court is of the opinion that any person has been corruptly or maliciously proceeded against under this Act, the Court may award such compensation as it deems fit to the person, so proceeded against and it shall be paid by the officer, person, authority or Government, as may be specified in the order.

7. Thus, on reading Section 58, it becomes abundantly clear that the police officer who has exercised powers corruptly or maliciously knowing that there are no reasonable grounds for proceeding under this Act is liable for sentence and punishment as prescribed in the section. Equally, sub-section (2) permits the Special Court to grant compensation, as may be found fit, to such person so proceeded against and the liability may be as against the

officer, person, authority or government. However, before exercising this power under sub-section (2) the Special Court has to form an opinion that the person has been corruptly or maliciously proceeded with under this Act. What we find, on reading sub-section (1), what we find is that, that the test for imposing sentence and punishment is "the exercise of the power by the officer, person, authority or government corruptly or maliciously." The same is the test for grant of compensation under sub-section (2). Therefore, basically the above referred applications are for a prosecution and punishment for an offence under section 58 of the POTA Act and consequentially for getting compensation under sub-section (2) of the POTA Act. Under different applications, the action is proposed against the different persons, namely, in first application, i.e. M.A. No. 69 of 2004 the action is proposed against the Police Officers, under second application, i.e. M.A. No. 70 of 2004 action is proposed against the Deputy Secretary to the Government of Maharashtra and in third application, i.e., M.A.No. 71 of 2004, the action is proposed against the Public Prosecutor who conducted the case. What we find is that it is basically a prosecution under sub-section (1) of Section 58 of the POTA Act. No doubt, by way of consequential finding in sub-section (1) the compensation has been provided for in sub-section (2).

8. Section 58(1) of the Act will have to be read with Sections 29, 50 & 56 of the Act. Section 29(1) provides procedure and powers of the Special court and according to that section; *subject to the provisions of section 50, a Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts.* Therefore, the powers of the Special Court under section 29 have been made subject to the section 50. Therefore, unless section 50 is complied with, the Special Court is not eligible to take cognizance of an offence.

. Section 50 also very categorically speaks that "No Court shall take cognizance of any offence under this Act without the previous sanction of the Central Government or, as the case may be, the State Government."

9. As the present prosecution was launched by the applicant - appellant, without obtaining a previous sanction from the State Government, the Special Court or any other court can not take cognizance of an offence under this Act. One more aspect which requires attention is the overriding effect which has been provided in Section 56 of the POTA Act which reads as under:

"56. Overriding Effect: the provisions of this act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

10. Thus, the combined reading of these sections provides a self-operative Code, independently, for a Special Court (i.e. POTA Court) and the net result is that unless the sanction is obtained under section 50 of the POTA Act by the complainant, the Special Court cannot take cognizance of such complaint under section 29 of the said Act. No other procedure can be invoked for this purpose in view of Section 56 of the Act.

11. It is an admitted fact on record that all these complaints have been filed by the appellant after he was discharged from the said POTA case, however, without obtaining the sanction under section 50 of the said Act. The appellant never approached the State Government for the purpose of getting sanction to prosecute the various persons named in the said complaints. He has directly approached to

the Special Court. Having found so, the Special Court has rejected the complaints. The learned counsel appearing on behalf of the appellant submitted that no doubt the cognizance cannot be taken by the Special court unless there is a sanction under section 50, however, it is not permissible for the Special court to reject or dismiss the complaint. The court can enter into an inquiry which is short of issuance of process. He submitted that the court may not take cognizance but the court can very well scrutinize as to whether there is a case for taking cognizance and where, in case the court finds that there is no case for taking cognizance the court may reject or dismiss it. Therefore, it is submitted that the verification can be recorded and/or evidence can be recorded for the purpose of taking cognizance, which can be looked into by the Special Court. Thus, an attempt in submissions is that, it is well noted that though cognizance of an offence under this Act cannot be taken without the sanction of the approprite government, all inquiries short of cognizance can be taken by the Special court.

. In support of this contention, learned counsel for the appellant drew our attention to the **2004 ALL MR (Cri) 1689**. It is decided by the Single Judge of this court in the case of Dayanand B. Nayak v/s. Ketan K. Tirodkar & Anr. (Criminal Writ Petition No. 1755 of 2003). It is

decided on 17th December 2003. This judgment is based on the provisions of Maharashtra Control of Organised Crime Act (1999). (Hereinafter, in short referred to as "the MCOCA Act".) It is submitted that the provisions of the MCOCA Act and the POTA Act are akin. Our attention was invited to paragraph No. 17 of the said judgment which is as follows:

> 17. In a private complaint entertained by the Special court under section 9(1) of the MCOCA, the steps taken under section 200 of the Code are procedure requirements and if the learned Special Judge proceeds to verify the complaint and records the statement of witensses on oath it cannot be termed as an action of taking cognizance. Under section 202 of the Code the learned Special Judge has a choice of postponing the issuance of process and if after considering the statement on oath of the complainant as well as the witnesses as recorded under section 202 of the Code, he is of the opinion that there is no sufficient ground for proceeding further he shall dismiss the complaint by recording reasons. Section 204 of the Code deals with the issuance of process and once the order of issuance of process is passed against the accused, it shall be deemed that the court has taken cognizance of such a private complaint. After the accused appears before the Special Court in response to an order of process, the Special Court is clothed with the power to discharge such an accused under section 227 and the stage of framing of charge under section 228 of the Code would not come. In the instant case as is clear from the orders passed by the court below the issuance of process has been postponed, though verification of the complainant as well as statement of two witnesses on oath have been recorded. Therefore it cannot be held that the

Special Court has taken cognizance of the private complaint though he has directed the same to be registered as a case under MCOCA.

12. We would like to make a reference to the provisions of MCOCA Act, and more specifically Sections 9 & 23 of the Act. Section 9 of the MCOCA Act speaks about procedure and powers of the Special Court under the said Act, which reads as follows:

> "A Special court may take cognizance of any offence without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts."

Section 23 (2) of the MCOCA Act reads as:

> "No Special Court shall take cognizance of any offence under this Act without the previous sanction of the police officer not below the rank of Additional director General of Police."

13. On plain observations of both the provisions of the MCOCA Act as referred to above, it will be evident that the provisions are not para materia same, namely Section 9 of the MCOCA has not been made subject to the sub-section (2) of Section 23 of the Act as it has been done in case of Section 29 along with Section 50 of the POTA Act. Apart from that, we are not in agreement with the Single Judge

reasoning, namely, in such a case, the Special Court may proceed with an enquiry and if after enquiry it is found that there is no substance in the case, the Special Court may dismiss the complaint and that if he finds that there is a substance in the case the Court shall postpone the act of taking cognizance. Such a modality has been developed by the Single Judge reading the provisions of the Criminal Procedure Code, more specifically, provisions providing mechanisum for taking cognizance. However, in view of provision 56 of POTA Act, those provisions cannot be followed by Special Court in the fact and circumstances of the case. The reasoning, as is evident on reading paragraph 17 of the judgment which is quoted above, suffers from a drawback and puts the State and Central Governments in embarrassing position. The Single Judge has lost the sight of the fact that the order dismissing the complaint is not a final order under the law and it can be very well challenged before this court and the Apex Court by filing appropriate proceedings. If the Superior courts come to the conclusion that the order of dismissal of such complaint by the Special Court was erroneous one, then there is a finding of the Superior court on record that there is a case for taking cognizance. In such a situation, at the most the superior court in view of Section 50, may direct the complainant to approach the State Government or the Central Government for getting a sanction to prosecute, so that the Special Court

can exercise a power of taking cognizance under section 29. However, at that stage, in view of the directions of the Superior courts if the complainant approaches the State or Central Government, the State Government or Central Government cannot ignore the finding of the superior courts and they are called upon to take decision whether to grant sanction or not to grant, in the backdrop of the finding recorded by the Superior court that there is a case for taking cognizance and thereby not only the Central Government and State Government are placed in an embarrassing position but the exercise of power under section 50 by the appropriate government becomes an empty formality. The matter becomes a fate accompli for both the governments. Same result equally follows in case Special Court comes to the conclusion that there is a case for taking cognizance but it can not be taken because there is no sanction under section 50 and issue direction to complainant to approach the appropriate Government to get sanction under section 50 of POTA Act. Therefore, the appropriate way for filing such prosecution is to approach to the appropriate government for getting a sanction and if the sanction is granted, thereafter to file the complaint under section 29 of which Special Court can take cognizance. Any other procedure, as submitted by the learned counsel and revealed from the reasoning as given by the Single Judge above, is not conducive to the judicial propriety and

especially to the right of the appropriate government to consider the case for grant of sanction or not to grant it. The scheme of the Act does not permit any other procedure except the procedure as we envisage from the provisions of the Act.

14. The learned counsel has also relied upon **AIR -1987 SC 735** in the matter of **Ram Kumar V/s. State of Haryana.** According to us, that discussion in the said case is about sections 132 and 197 of the Code of Criminal Procedure. However, the said provisions will not apply in view of the provisions of the Special Act and more specifically Section 56 of the POTA Act which has given the overriding effect over the general Acts. Therefore, the said case is of no help to the learned counsel.

15. Therefore, what we find is that the rejection of the complaint for want of sanction under section 56 of POTA Act by the Special Court is just and proper and no interference is called for.

16. While this matter was being heard yesterday, it was pointed out by us to the learned counsel Mr. Mihir Desai that why not to follow the procedure of obtaining sanction under section 50 of the POTA Act first in-stead of coming to court by this way, i.e. to file a complaint

without getting a sanction and to ask the said judge to proceed upto the stage of issuance of the process and thereafter to postpone the issuance of process in case the Special Court comes to conclusion that there is case of taking cognizance but it can not be taken for want of sanction under section 50 of POTA Act. It was suggested to the complainant's counsel to withdraw the complaint and approach the state government for getting sanction. At that point of time, the learned counsel submitted that there is no hitch in following that procedure, namely approaching the State Government for getting sanction first and thereafter to file a complaint. However, he submitted that while disposing of this complaint, apart from objection under section 29 read with Section 50, the trial Court has considered the matter on merit also and those observations are likely to come in their way when the matter is being considered by the State Government and that will cause prejudice to the complainant. Mr.Vijaysing Thorat, learned Advocate General for the State of Maharashtra who is opposing this appeal was fair enough in submitting that in case the complaint is allowed to be withdrawn and the complainant approaches the State government under section 50 for the purpose of getting sanction, the case of the complainant will be considered by the State Government without being influenced by the observations made by the Special Court in the order under challenge. Therefore, the

matter was adjourned so as to enable the counsel for appellant to take instructions from the appellant as to whether he would like to withdraw the appeal and approach the State Government with further recording of statement of the Advocate General as aforesaid.

. Today, learned counsel Shri. Mihir Desai is not present. Advocate on record, Ms. Rebecca Gonzalvez is present. She reports that Shri. Desai has recently left for Delhi, however, on discussions with the appellant, the appellant has instructed not to withdraw the matter and the court may pass the appropriate order. Under these circumstances, we are required to consider the appeal and we pass the aforesaid order.

17. We also asked Ms.Rebecca Gonzalvez, who was yestereday present when the matter was being argued by Mr. Mihir Desai and Mr.V.A.Thorat, learned Advocate General as to whether any point, though argued, is left to be addressed by us while passing this order. She stated that all the points raised by Mr. Mihir Desai have been considered in the order. Learend Advocate General Mr.Thorat also submitted that no point has been left out by this court and except above referred submissions no point was argued before the court.

18. Therefore, as we have found that the order passed by the Special Court is just and proper and requires no interference from this court, we are not inclined to entertain this appeal. Therefore, we reject the appeal at the admission stage itself. Appeal is summarily rejected.

(ANOOP V.MOHTA, J.) **(S.B.MHASE,J.)**